



Guidelines on Access to the File



Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission



Introductory Note

On the 31st January 2022, the Competition (Amendment) Bill 2022 (no. 12 of 2022) was initiated and published, thereby commencing the legislative procedure in the Oireachtas. The Bill aims to implement Directive (EU) 2019/1 of the European Parliament and of the Council, also known as the ECN+ Directive.

Aspects of this Policy are based upon the text of the Bill, as it was published and will refer to the Bill as the Competition (Amendment) Act 2022 (the title as is envisaged by the Bill) and all references to the Act, or any of the proposed amendments to other legislation, will be cited as if the Act had been enacted and will, if required, be updated in accordance with the final version of the Act.

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1. Introduction

1.1 This guidance document (the “Access to the File Procedures”) sets out the procedures adopted by the Competition and Consumer Protection Commission (the “CCPC”) for providing access to the File (as described in Paragraph 4.2). These procedures apply in:

1.1.1 phase 2 merger investigations (a “Merger Investigation”).

1.1.2 investigations into suspected breaches of Sections 4 and 5 of the Competition Act 2002 as amended (the “2002 Act”) and/or Articles 101 and 102 of the Treaty on the Functioning of European Union (“TFEU”) carried out under Part 2C of the 2002 Act (an “Antitrust Investigation”); and

1.1.3 other investigations in which the CCPC issues a statement of objections under section 15L(1), being an investigation of: (i) a suspected breach of a procedural requirement imposed by the CCPC in connection with an investigation under Part 2C of the 2002 Act; (ii) a suspected failure to comply with commitments entered into under section 15AE of the 2002 Act; (iii) a suspected failure to comply with a structural or behavioural remedy imposed under section 15X of the 2002 Act in accordance with section 15Z of the 2002 Act; and (iv) a suspected failure to comply with a prohibition notice issued under section 15H of the 2002 Act (together, referred to as an “Other Investigation”).

A Merger Investigation, Antitrust Investigation and Other Investigation are together referred to in this guidance document as an “Investigation”).

1.2 The Access to the File Procedures are intended to provide guidance to undertakings and their advisors on the CCPC’s policy and practice in relation to

access to the File in the course of an Investigation. It is not intended to be a binding statement of how discretion will be exercised in a particular situation and should not be taken as such.

2. Who is entitled to access to the File?

- 2.1 The CCPC grants access to the File to the persons¹, undertakings² or associations of undertakings to which: (i) the CCPC addresses the Assessment³ (in the case of Merger Investigations); or (ii) the CCPC addresses a Statement of Objections⁴ or Investigation Report⁵ (in the case of Antitrust Investigations and Other Investigations) (together the “Parties”, or each a “Party”).

¹ The term ‘person’ encompasses natural and legal persons. Where entities without legal personality which are also not undertakings become involved in CCPC Investigations, the CCPC applies, where appropriate, the principles set out for Third Parties (as defined in Paragraph 3.5).

² As defined in section 3 of the 2002 Act.

³ Within the meaning of Paragraph 3.8 of the CCPC’s [Mergers and Acquisition Procedures dated 31 October 2014](#) available on www.cpc.ie.

⁴ [As particularised in section 15L(1) of the 2002 Act]

⁵ [As particularised in section 15L(9) of the 2002 Act]

3. When is access to the File granted?

- 3.1 The Parties gain the right of access to the File only following their receipt of the CCPC's Assessment or the Statement of Objections. Prior to the issue of the Assessment or Statement of Objections, the Parties have no right of access to the File. In a Merger Investigation the Parties must request access to the File.
- 3.2 In circumstances where the CCPC makes a referral to an adjudication officer in an Antitrust Investigation, the Parties gain the right to access any additional material not already provided, which is relied on by the CCPC for the purposes of the referral⁶. In circumstances where the CCPC agrees a settlement with a Party and prepares a simplified investigation report pursuant to section 15L(8) for the purpose of making a referral to an adjudication officer, a settling Party will not gain any additional right of access to the File.
- 3.3 In order to facilitate access to the File, the CCPC will issue to the Party an enumerative list of documents setting out the content of the File (the "Schedule"), as described in Paragraph 4.2 below. The Schedule will be provided either at the same time as the Assessment or Statement of Objections/Investigation Report or as soon as practicable thereafter and no later than 2 working days following issuance of the Assessment or Statement of Objections/Investigation Report. A Party who wishes to seek access to documents on the File must then indicate in writing to the CCPC which of the accessible documents (as described in Paragraphs 4.12 to 4.13) listed in the Schedule they wish to inspect.
- 3.4 A Party will be given access to documents on the File as soon as is practicable upon request, and in the case of a Merger Investigation within 5 working days of receipt of a request for access to documents on the File. Access to documents

⁶ [See section 15L(9)(b)]

on the File is subject to such redactions as the CCPC may judge necessary and appropriate in order to protect commercially sensitive information⁷, protect the rights of the parties or any other person, or for any other good and sufficient reason.

- 3.5 Subject to confidentiality considerations of persons, undertakings, associations of undertakings, public bodies, and National Competition Authorities (the “NCAs”) who have submitted information to the CCPC in the course of its Investigation (together “Third Parties”) or of the other Parties, any new document which is added to the File following the issuance of an Assessment or Statement of Objections/Investigation Report will be provided to the Party as soon as reasonably possible without the requirement to make a further request.
- 3.6 Access to the File is granted subject to the condition that the information thereby obtained can only be used for the purpose of replying to the Assessment or Statement of Objections/Investigation Report, or in connection with the CCPC’s Investigation⁸, and the CCPC will have regard to the conditions set out in [section 15AV] of the 2002 Act⁹. In certain circumstances, the CCPC may seek to enter into a data sharing agreement with Parties to ensure compliance with its obligations under relevant data protection laws.

⁷ As defined in section 3(1) of the 2002 Act.

⁸ This includes for the purpose of proceedings under Part 2D or 2H of the 2002 Act.

⁹ See in particular, the conditions set out in sections 15AV(7), (8) and (10) of the 2002 Act.

4. Documents to which access may be granted

The File

- 4.1 Access to the File is granted to afford a Party(ies) the opportunity to acquaint themselves with information in the CCPC's File, in order to fully express their views on the preliminary conclusions reached by the CCPC in its Assessment or the Statement of Objections/Investigation Report.
- 4.2 The File consists of documents which have been obtained, produced and/or assembled by the CCPC during an Investigation.
- 4.3 In respect of a Merger Investigation, the File includes the evidence on which the CCPC relies in the Assessment and ultimately in its determination.
- 4.4 In respect of an Antitrust Investigation, the File includes material relied upon by the CCPC for the purposes of issuing the Statement of Objections or referring the matter to an adjudication officer pursuant to section [15M] of the Act.
- 4.5 In the course of an Investigation, the CCPC may gather documents which, following a more detailed examination, prove to be unrelated to the subject matter of the Investigation. Such documents will be removed from, and no longer constitute, part of the File. Identical copies of documents may also be removed by the CCPC, in particular duplicate emails.
- 4.6 In the case of Antitrust Investigations, as a general rule, no access will be granted to the replies of other Parties to the Statement of Objections or Investigation Report. The CCPC may, however, in the interests of fair and effective enforcement, give one or more of the Parties a copy of the non-

confidential version (or a summary/specific excerpts thereof) of the (other) Parties' written replies to the Statement of Objections/Investigation Report and give them the opportunity to submit their comments.

The status of internal documents

4.7 The CCPC's internal documents do not constitute part of the evidence on which the CCPC can rely in its Assessment or Statement of Objections/Investigation Report and as such are not accessible to Parties that request access to the File. Given the lack of evidential value of such internal documents, this approach does not prejudice the proper exercise of the Parties' rights of defence in an Investigation. Internal communications are considered to be internal documents and therefore, do not form part of the File.

4.8 Documents which are considered to be internal also include:¹⁰

- (a) documents and correspondence relating to the CCPC's procurement of contractors or studies, including evaluation of contractors;
- (b) the CCPC's correspondence with service providers, including draft reports and studies;
- (c) the CCPC's correspondence with public bodies¹¹ in or outside the State, including the European Commission, other National Competition Authorities, the Director of Public Prosecutions and the Chief State Solicitor's Office, and the internal documents received from such bodies.

4.9 In certain exceptional circumstances access may be granted to non-confidential versions of internal documents where those documents are deemed to no longer possess a purely internal character, namely: (i) internal documents relied upon in the CCPC's Assessment or the Statement of Objections/Investigation Report; and, (ii) internal documents containing exculpatory information, that is information which may support the Parties'

¹⁰ Examples provided in this document are intended to form guidance only, and are not exhaustive.

¹¹ Public bodies include, but are not limited to, a Department of State, An Garda Síochána, the Revenue Commissioners, statutory bodies and authorities including the Commission for Communications Regulation and the Central Bank of Ireland, and Semi-State Bodies.

position either (in the case of a Merger Investigation) that a significant lessening of competition would not occur as a result of the merger or (in the case of an Antitrust Investigation) that a breach of competition law has not occurred or (in the case of an Other Investigation) that a relevant breach has not occurred.

4.10 There is no obligation on the CCPC to keep any minutes or notes of meetings with the Parties or with Third Parties. If the CCPC chooses to keep such minutes or notes of meetings, they constitute the CCPC's own interpretation of what was said at the meetings and are included in the category of internal documents.

4.11 Where, however, the Party or Third Party in question has agreed to the minutes or notes of a meeting, that record may constitute part of the evidence on which the CCPC relies in its Assessment or the Statement of Objections/Investigation Report and become accessible as part of the File.

Accessible documents

4.12 The Parties will be granted access to all documents making up the File, as described in Paragraph 4.2, with the exception of internal documents and documents containing commercially sensitive information or other confidential information of the other Parties, or of Third Parties. Access will be granted, where possible, to accessible versions of non-accessible confidential documents. In certain circumstances where confidentiality can only be assured by summarising the relevant information, an accessible document may take the form of a non-confidential summary. Non-confidential versions of confidential information relied upon by the CCPC in its Assessment or Statement of Objections/Investigation Report, as well as non-confidential versions of confidential information of an exculpatory nature, will be made accessible to the Parties.

- 4.13 Accessible documents will include the results, terms of reference and methodology of any study commissioned by the CCPC in connection with its Investigation.
- 4.14 A Party will not be granted access to documents which it has itself provided to the CCPC during the Investigation, as those documents will already be accessible to that Party.

Non-Accessible Documents

- 4.15 Documents in the File that contain confidential information are non-accessible. The File may include confidential documents containing two distinct categories of confidential information, namely: commercially sensitive information and “other confidential information”.

Commercially sensitive information

- 4.16 Pursuant to section 3(1) of the 2002 Act, “commercially sensitive information” means information the disclosure of which could reasonably be expected to—
- (a) substantially and materially prejudice or harm the commercial, financial or industrial interests of the undertaking or person to which it relates,
 - (b) substantially prejudice or harm any other interests of a person in the conduct of the person's business, profession or occupation, or
 - (c) substantially prejudice or harm the interests of the State or a public body.
- 4.17 Examples of information that may qualify as commercially sensitive information include, but are not limited to: technical and/or financial information relating to a Party's or Third Party's know-how; methods of assessing costs; production secrets and processes; supply sources; quantities

produced and sold; market shares; customer and distributor lists; marketing plans; cost and price structure; and sales strategy.

4.18 Confidentiality claims can normally only pertain to information obtained by the CCPC from the same Party or Third Party making the claim and not to information from any other source.

4.19 As correspondence on the confidentiality of any document is so closely interrelated to the issue of confidentiality, such correspondence may also be considered as non-accessible.

Other confidential information

4.20 Other confidential information includes information other than commercially sensitive information which may be considered as confidential insofar as its disclosure would significantly harm the Party or Third Party who provided the information. Depending on the specific circumstances of each case, this may apply to information provided about a Party or Third Party who would be able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers, including on the Party or Third Party who provided the information.

4.21 Therefore, the concept of “confidential information” may include in this context information that would enable the identification of Parties or Third Parties (including complainants) where those Parties or Third Parties have submitted an anonymity request and the CCPC has determined to provisionally accept the claim in accordance with Paragraph 6.4 below.

4.22 The category of other confidential information also includes military secrets.

4.23 Information will be regarded as confidential, when the following conditions are met: i) disclosure of such information must be liable to cause serious harm to the disclosing Party or Third party; and, ii) the interests liable to be harmed

by the disclosure must be objectively worthy of protection. The CCPC's assessment of whether information constitutes commercially sensitive information or other confidential information is made on a case-by-case basis.

Information that will not be considered confidential

- 4.24 Information which is not considered to constitute either “commercially sensitive information” or “other confidential information” as described in Paragraphs 4.16 to 4.23 will not be considered confidential.
- 4.25 Information which is already known outside the Party or the Third Party providing the information (in the case of a group, outside the group) will not normally be considered confidential. For information to lose its confidential nature, it is sufficient for it to be available to, or known outside, the Party or the Third Party or capable of being inferred from publicly available information.
- 4.26 Information that has lost its commercial importance, for example due to the passage of time, can no longer be regarded as confidential. As a general rule, the CCPC presumes that information pertaining to turnover, sales, market-share data and similar information ceases to be confidential five years after the period to which it relates or when that information become available in the public domain, whichever is earlier.

5. Submission of Confidential Information

Making confidentiality claims

- 5.1 Where information is submitted to the CCPC, whether on an own-initiative basis or upon request in the course of an Investigation, any material in respect of which confidentiality is claimed (whether business secrets or other confidential information) should be identified clearly at the time when the information is submitted and reasons given to substantiate each claim of confidentiality. The reasons given must be sufficiently detailed to enable the CCPC to assess the validity of the confidentiality claim.
- 5.2 Standard confidentiality stamps in letterheads from law firms, or automatic disclaimers in e-mails, or set out as a header/footer, etc., of each page of either the notification form or document submitted to the CCPC are not regarded as reasoned requests for confidentiality.
- 5.3 See Paragraph 6.4 where in very limited cases, Parties and Third Parties may request that their material be treated anonymously.

Submission of non-confidential versions of documents

- 5.4 Parties and Third Parties must submit a non-confidential version of each submission/document in respect of which they wish to claim confidentiality.
- 5.5 In general, confidentiality cannot be claimed for an entire document or whole sections of it when it is possible to protect confidential information with limited redactions. **Entirely blank or blacked-out pages will not be accepted.** At a minimum, headings of the documents and/or the headings of the columns contained in tables and pictures, as well as any list of annexes, must

be left intact. Where any Party or Third Party redacts confidential information, they must do so in a manner that maintains the overall sense of the document (see Paragraph 5.11). The method of redaction used to draw up non-confidential versions of documents depends in part on the type of confidential information involved. Combinations of different techniques, such as extracting and summarising, may be used. If confidentiality stems from the precision of given figures (for example, commercial data), sufficiently indicative ranges must be used.

- 5.6 Where appropriate, restricted access (typically in the form of a confidentiality ring or a data room procedure, or counsel to counsel access only) may be used in combination with, or as an alternative to, the provision of non-confidential versions or summaries (see Paragraph 7.6).
- 5.7 Where an Antitrust Investigation involves more than one Party, each Party must clearly identify their confidential information, and the reasons for each confidentiality claim, for all documents submitted to the CCPC. All non-confidential versions of all documents submitted to the CCPC by the Party will be made available to the other Party/Parties when access to the File is granted.
- 5.8 In the case of a Merger Investigation, the CCPC invites each of the Parties to provide a non-confidential version of each document at the time of submission. Within 10 working days of the CCPC's decision to carry out a full investigation under section 22 of the 2002 Act, each of the Parties must provide non-confidential versions of all documents submitted during the Phase I review period, after which the Parties must provide non-confidential versions of all documents at the time of submission. If the Parties fail to provide confidentiality claims the CCPC reserves the right to decide, at its own discretion, what information is considered confidential for the purpose of the File.

- 5.9 In a similar way, Parties and Third Parties seeking anonymity must also highlight information which they consider could reveal their identities (see Paragraph 6.4).

Submission of Non-Confidential Summaries and Descriptions

- 5.10 Where alternative methods of redaction are not effective or appropriate, the non-confidential version of a document may take the form of a sufficiently comprehensible and precise non-confidential summary of its content. Non-confidential summaries must hold the same evidential value as the non-accessible document or redacted information to which they pertain.
- 5.11 Where non-confidential versions of documents contain redactions, the non-confidential version and any accompanying descriptions of redacted information must be provided in a manner that enables the Parties to determine whether the redacted information is likely to be relevant for their defence and therefore whether there are sufficient grounds to request the CCPC to grant access to the information claimed to be confidential.
- 5.12 Where a non-confidential version of a non-accessible document is not provided, a succinct description of the document will be provided in the Schedule to allow the Parties to understand the nature of the document and enable them to put forward arguments as to why the document should be disclosed notwithstanding its confidential character.
- 5.13 In certain circumstances, such as where confidentiality is claimed but the Party or Third Party does not provide adequate non-confidential summaries or descriptions, or where the CCPC considers it necessary to facilitate the Parties' rights of defence, the CCPC may provide its own non-confidential summaries or descriptions of redacted information or non-accessible documents.

6. Treatment of Confidential Information and Anonymity Requests

- 6.1 Upon receipt of a claim for confidentiality, the CCPC will either provisionally accept the claim or inform the Party or Third Party in question that it does not agree with the claim in whole or in part. Where the CCPC has provisionally accepted the claim of confidentiality it may reverse its provisional acceptance in whole or in part at a later stage (see Paragraph 6.7).
- 6.2 Where the CCPC rejects a claim of confidentiality it must inform the Party or Third Party in writing of its intention to disclose the information, give its reasons for rejecting the claim of confidentiality and set a time-limit within which such Party or Third Party may inform the CCPC in writing of its views.
- 6.3 Where either a Party or Third Party have not requested confidential treatment of certain information they have provided to the CCPC, but where the CCPC considers that information to be confidential, for example, because the disclosure of the information to the Parties could result in the unintended or inappropriate sharing of commercially sensitive information between competitors, the CCPC will treat that information as confidential.
- 6.4 As noted above, in exceptional circumstances the CCPC will consider requests for anonymity where a Party or Third Party providing information faces a real risk of retaliation. Upon receipt of a request for anonymity, the CCPC will either provisionally accept the claim or inform the Party or Third Party in question that it does not accept the claim. Where the CCPC has provisionally

accepted the claim of anonymity it may reverse its provisional acceptance in whole or in part at a later stage (see Paragraph 6.7).

- 6.5 Parties and Third Parties must explicitly state why anonymity is necessary. The justification provided must be sufficient to enable the CCPC to assess the request for anonymity. In assessing a request for anonymity, the CCPC will consider whether the disclosing Party or Third Party faces a real risk of retaliatory measures from the Party or Third Party about whom the information pertained. The CCPC will reject a claim for anonymity where it considers that: (i) the requesting Party/Third Party does not face a real risk of retaliation; or (ii) anonymisation could not effectively protect the identity of the requesting Party/Third Party.
- 6.6 Where the CCPC rejects a claim of anonymity, it must inform the Party or Third Party in writing of its decision, give its reasons for rejecting the claim of anonymity and set a time-limit within which such Party or Third Party may inform the CCPC in writing of its views.
- 6.7 The CCPC must balance the Parties' rights of defence with the right to protect commercially sensitive information, confidentiality, and the anonymity of Party/ Third Parties at risk of reprisals; none of which rights are absolute. The CCPC must also reconcile these rights with the need for speed in Merger Investigations, the need to conclude Antitrust Investigations within a reasonable timeframe, and the statutory requirements on the CCPC to carry out its functions. In this context the need to safeguard the rights of the defence of the Parties through the provision of the widest possible access to the File may outweigh the right to protect the confidential information of other Parties or Third Parties. It is for the CCPC to assess whether those circumstances apply to any specific situation. Where those circumstances apply, and where non-confidential versions, summaries, or descriptions of

the relevant confidential information are not sufficient, the CCPC may disclose that confidential information to the Party/Parties.

- 6.8 The acceptance or refusal of a confidentiality claim is done with a view to establishing an Assessment or Statement of Objections/Investigation Report and in no way precludes a later assessment of the confidentiality of the information in the public version of the decision that will be published by the CCPC.

7. Provision of Access to File

General Approach

- 7.1 Any Party who wishes to seek access to documents on the File must indicate which of the accessible documents listed in the Schedule they wish to inspect.
- 7.2 Access to documents on the File will be granted in any of the following ways, or in any combination of them, taking due account of the technical capabilities of the Parties: electronically (by email or otherwise) or by providing copies of the accessible documents in paper form. The CCPC is under no obligation to provide a translation of documents in the File.¹²
- 7.3 If a Party considers that, after having obtained access to documents on the File, it wishes to gain access to a non-accessible document, or specific confidential information, it must make a written request to the CCPC outlining why the document or redacted information is likely to be necessary to allow the Party to exercise its rights of defence. The CCPC will assess whether the need to safeguard the rights of defence of the requesting Party outweighs the need to protect the confidential information of another Party or Third Party (see Paragraph 6.7).
- 7.4 The CCPC will assess whether such information as discussed in Paragraph 7.3 may tend to prove either, in the case of a Merger Investigation that a significant lessening of competition will occur as a result of the merger, or in the case of an Antitrust Investigation or Investigation of a Procedural Breach to prove that a breach of has occurred. The CCPC will also assess whether such information as discussed in Paragraph 7.3 may tend to disprove either in the case of a Merger Investigation that a significant lessening of

¹² This includes documents or records provided to the CCPC in either of the official languages of the State.

competition will occur as a result of the merger or in the case of an Antitrust Investigation or Investigation of a Procedural Breach that a breach has occurred.

Exceptional circumstances

- 7.5 In certain cases, the CCPC may grant access to confidential information through the use of a negotiated disclosure procedure. Under this procedure, the CCPC will seek consent from a Party or Third Party to voluntarily waive their right to the claimed confidentiality. This waiver is provided on the basis of the Parties limiting access to confidential information to a restricted circle of persons (to be decided by the Parties and the affected Party or Third Party, under the supervision of the CCPC) who are required to enter into confidentiality undertakings.
- 7.6 In exceptional cases, and at the CCPC's sole discretion, the CCPC may also arrange for parts of the file to be made accessible through a data room procedure if it considers such an approach necessary to safeguard the Party's rights of defence. In such cases, the CCPC will provide the Party with detailed rules and procedures for the operation of a data room.
- 7.7 In exceptional cases, such as when the CCPC and a Party persistently disagree on whether that Party is entitled to access redacted or confidential information, at its sole discretion, the CCPC may, if it considers such an approach necessary to safeguard the Party's rights of defence, consider referring the matter to an independent arbiter.

Access to Leniency Statements and Settlement Submissions

- 7.8 In circumstances where access to a leniency statement or settlement submission may be granted pursuant to [section 15AV(6) of the 2002 Act], such access is granted only at the premises of the CCPC and on a single occasion. In accordance with [section 15AV(7) of the 2002 Act], access to a

leniency statement or settlement submission is granted to a Party solely for the purposes of defending itself in proceedings before the CCPC under [Part 2D or 2E of the 2002 Act] or in any subsequent proceeding under [Part 2H of the 2002 Act]. In accordance with section [15AV(8) of the 2002 Act], where a Party is given access to a leniency statement or settlement submission, the Party shall be deemed to have given an undertaking that any such information to which it has been given access will only be used in proceedings that are directly related to those in which access has been granted, and will not be retained, stored or otherwise kept following the end of the said proceedings or any subsequent proceeding under [Part 2H of the 2002 Act].



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